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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

v.

BENNER-CORYELL LUMBER COMPANY, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

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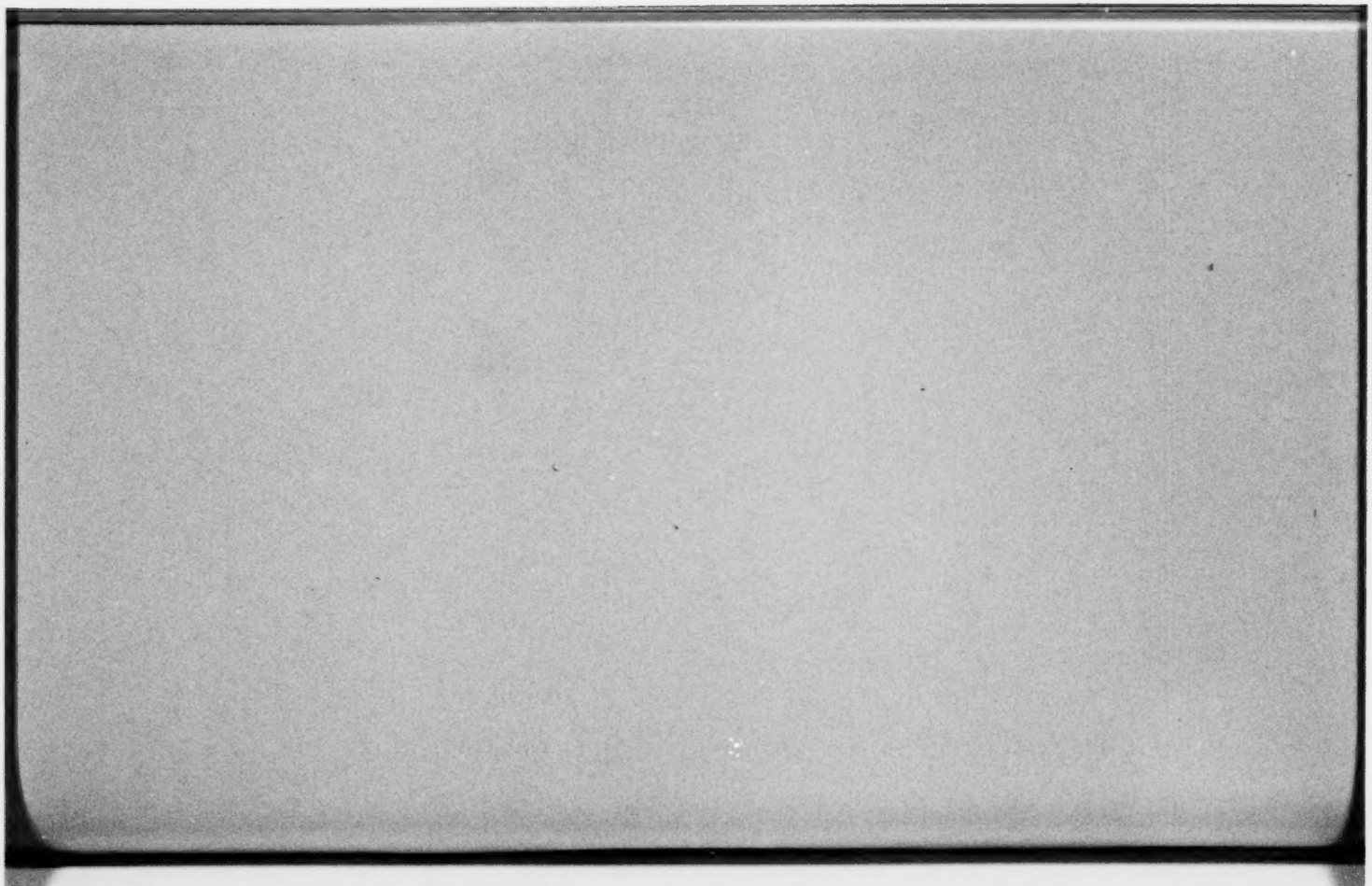

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

The State of Indiana, by its counsel, prays that a writ of certiorari be issued to review the decree of the Supreme Court of Indiana entered in the above case December 17, 1940, reversing the decree of the Wabash Circuit Court of that State which overruled the demurrer of the plaintiff.

OPINIONS BELOW

The decree of the trial court is set forth in the Record (p. 9). The opinion of the Supreme Court of Indiana (R. 12) is not yet reported in the official State reports but is reported in 29 N. E. (2d) 776.

JURISDICTION

(a) The decree of the Supreme Court of Indiana was entered December 17, 1940 (R. 20). The jurisdiction of this court is invoked under Section 237(b) of the Judicial Code as amended.

(b) The Supreme Court of Indiana held the application of Section 2 (g) (4) of the Indiana unemployment compensation law to the particular facts violative of the Fourteenth Amendment to the Constitution of the United States. The ruling of the Supreme Court of Indiana, therefore, brings the matter within the jurisdictional provisions relied upon.

Virginia v. *Imperial Coal Sales Co.* (1934), 293 U. S. 15.

(c) The decision of the Supreme Court of Indiana was predicated solely on a federal question and specifically holds that Section 2 (g) (4) is not violative of the Indiana Constitution.

(d) The decision of the Supreme Court of Indiana reversing the judgment of the trial court with directions is final since it disposes of the whole case on the merits, directs what judgment shall be entered and leaves nothing to the judicial discretion of the trial court.

Rio Grande Western R. Co. v. *Stringham* (1915), 239 U. S. 44.

QUESTIONS PRESENTED

Whether a provision of the Indiana unemployment compensation law (Acts 1939, Chapter 121, Sec. 2 (g) (4)), which provides for the taxation of small employing units not otherwise subject to such taxation, when said employing units are controlled with other units by the same interests, resulting in the aggregate employment control affecting eight or more persons, is valid within the purview of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, particularly where applied to two corporations, the majority of voting stock of each of which is owned by the same person.

Whether a State unemployment compensation law violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by providing that, for the purpose of determining whether an employer is subject to the act as employing eight or more individuals for twenty weeks, employing units under common ownership or control shall be treated as a single unit.

STATUTES INVOLVED

Employing units which[1] control the employment of eight or more persons are subject to the Indiana unemployment compensation law. The basic definition of the term employer, as that term is used in the Indiana unemployment compensation law, Acts 1936 (Spec. Sess.), chap-

[1] The term employing unit is defined as follows:

"Any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company, corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor to any of the foregoing, or the legal representative of a deceased person, which has, or subsequent to January 1, 1935, has had in its employ one or more individuals performing services for it within this State. * * *" Sec. 2 (f) (1) of the law. [Burns Ann. Stat. 1940) 52-1502 (f) (1).]

ter 4, page 80 as amended by Acts, 1937, chapter 125, page 705; as amended by Acts, 1938 (Spec. Sess.), chapter 6, page 24; as amended by Acts, 1939, chapter 121, page 585 [Burns' Ann. Stat. (1940), 52-1501, et seq.], includes:

> "Any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment, eight or more individuals (irrespective of whether the same individuals are or were employed in each such day);" (Sec. 2 (g) (1) of the law) [Burns' Ann. Stat. (1940), 52-1502 (g) (1)].

Section 2 (g) (4) of the law [Burns' Ann. Stat. (1940), 52-1502 (g) (4)], includes in addition within the term employer:

> "Any employing unit which together with one or more other employing units, is owned or controlled directly or indirectly by the same interests, or which owns or controls one or more other employing units, and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection;" (Sec. 2 (g) (4) of the law) [Burns' Ann. Stat. (1940), 52-1502 (g) (4)].

STATEMENT

This petition is the result of an action instituted by the respondent as plaintiff for the refund of unemployment compensation contributions alleged to have been improperly assessed by the defendant.

In its complaint (R. 1) respondent alleged that it was a corporation having its principal place of business in Indiana and that it never at any time had in excess of three individuals in its service. It also alleged that peti-

tioners had improperly charged or assessed contributions against it in the amount of $360.32 and it demanded payment therefor; that it had paid such amount under protest and has served the petitioners with a notice of its claim for refund but that no such refund was made. The petitioners in its answer (R. 4) made a general denial and in addition alleged that the respondent incurred the contribution liability as an employer under the Indiana unemployment compensation law because of its relationship to the Fairmount Lumber Company. The petitioner claimed that Bertha J. Coryell who since April 1937 was the owner of 60 out of 90 shares of the voting stock of the respondent lumber company was also, since that date, the owner of 185 out of 300 shares of the voting stock of the Fairmount Lumber Company, an Indiana corporation. Petitioners also alleged that the respondent corporation, together with the Fairmount Lumber Company had eight or more individuals in employment in each of twenty different weeks during the calendar year 1937 and 1938, all of which facts are undisputed. Petitioners claimed that the liability of the respondent lumber company for those years was thereby established under section 2 (g) (4) of the Indiana unemployment compensation law,[1] quoted above.

[1] The liability of the plaintiff lumber company for the calendar year 1939 was predicated on the provision of section 2 (g) (1) of the law quoted above whereby an employing unit having a stated experience during the current or the *preceding* calendar year is defined as an employer. The plaintiff lumber company's liability for the entire year 1937, instead of the period subsequent to April, 1937, was predicated upon the provision of section 3 (a) of the Indiana unemployment compensation law (R. 6), which provides:

"Any employing unit which is or becomes an employer subject to this Act within any calendar year shall be subject to this Act during the whole of such calendar year." (Sec. 3 (a) of the law.) [Burns Ann. Stat. (1940) 52-1503 (a).]

The applicability of these provisions was not controverted in the pleadings and was not considered in the opinions of the courts below.

The respondent demurred to these allegations (R 6) and contended that Section 2 (g) (4) of the Indiana unemployment compensation law was unconstitutional as violative of Section 1, Article 10 of the Constitution of the State of Indiana which provides for "a uniform and equal rate of assessment and taxation," the Thirteenth Amendment to the Constitution of the United Sttates, and the Fourteenth Amendment to the Constitution of the United States. The Wabash Circuit Court overruled the demurrer of the respondent (R 9). An appeal was taken to the Supreme Court of the State of Indiana where the decision of the lower court was reversed and Section 2 (g) (4) of the Indiana unemployment compensation law was declared valid under the Indiana constitution but unconstitutional as in violation of the equal protection clause to the Fourteenth Amendment to the Constitution of the United States.

A petition for a rehearing was denied by the Indiana Supreme Court on December 17, 1940, (R. 20) 29 N. E. (2d) 776.

ASSIGNMENT OF ERRORS

1. The Supreme Court of Indiana erred in failing to hold the classification involved in Section 2 (g) (4) of the Indiana unemployment compensation law constitutional, as a reasonable means of avoiding evasion of the provisions of the law.

2. The Supreme Court of Indiana erred in holding the effect of Section 2 (g) (4) to be one of unreasonable discrimination when in fact its purpose and effect is to avoid discrimination.

REASONS FOR GRANTING THE WRIT

1. Unlike the decision of the Supreme Court of Georgia in *Independent Gasoline Company* v. *Bureau of Unemployment Compensation of the State*

> *of Georgia,* — Ga. —, 10 S. E. (2d) 58, cert. denied, — U. S. — (November 25, 1940), the Supreme Court of Indiana specifically held that the Act did not violate the Indiana Constitution and based its decision solely upon the violation of the Fourteenth Amendment to the United States Constitution.

The federal constitutional issue here involved is identical to that presented in the case of *Independent Gasoline Company v. Bureau of Unemployment Compensation of the State of Georgia* (1940), 10 S. E. (2d) 58. When that case was before this court on petition for writ of certiorari it was urged that there was no independent non-federal ground for the decision of the Supreme Court of Georgia. This was predicated upon the specific reference to state constitutional provisions in the decision of the Supreme Court of the State of Georgia in that case. Apparently no satisfactory showing was made of the presence of an independent [redacted]-federal ground and it is assumed that this was the basis for this court's denial of the petition for writ of certiorari.

In the instant case, however, the Supreme Court of Indiana removed this case from the status of the *Independent Gasoline Company* case by holding that no provision of the Indiana Constitution had been violated. The only state constitutional ground urged by the respondent was an alleged violation of Article 10, Section 1, of the Constitution of Indiana. With respect to this provision the Supreme Court of Indiana said:

> "That taxes imposed by the Indiana Unemployment Compensation Law are excise and not property taxes. *Carmichael v. Southern Coal & Coke Co.* (1937), 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A. L. R. 1327; *Charles C. Stewart Mach. Co. v. Davis* (1937), 301 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A. L. R. 1327. Section 1 of article 10 of the Constitution of Indiana, which provides

> for a uniform and equal rate of assessment and taxation and forbids exempting property except for specific purposes, applies only to property taxes under a general levy. *Miles v. Dept. of Treasury* (1935), 209 Ind. 172, 199 N. E. 372."

The court then proceeded to consider the constitutionality of the statute under the Fourteenth Amendment of the Federal Constitution and quoting at length from the opinion of the Supreme Court of Georgia in the *Independent Gasoline Company* case concluded that the application of the statute sought by the state would do violence to the appellant's constitutional rights. (R. 19.)

> 2. The importance of the question here presented and the probable harmful effects on the national system of unemployment compensation if the decision of the Indiana Supreme Court is allowed to stand.

We have stated above that we believe that the petition for writ of certiorari in the *Independent Gasoline* case was denied because of an independent non-federal ground for the state court's decision. If, however, this court had any doubt as to the importance of the substantive federal issue here involved we submit that the decision in this case would settle that question. The decision in the instant case was rendered while the petition for certiorari in the *Independent Gasoline* case was still pending before this court. The court will note that the Indiana court in dealing with the federal question presented, rests its decision almost entirely upon the decision of the Supreme Court of Georgia, and it indicated that it believed the Georgia decision to be a decisive precedent as to the meaning of the equal protection clause of the Federal Constitution. The importance of this petition is demonstrated by the consideration that the action of the Indiana court foreshadows the invalidation of statutory provisions

of this type in more than thirty states[1] which have adopted it.

[1] Alaska, sec. 2 (h) (4), Session Laws of Alaska 1937—Extraordinary Session, ch. 4; Arizona, sec. 19, Session Laws of Arizona 1936—First Special Session, ch. 13, amended by Session Laws 1937, ch. 68; Colorado, sec. 19 (f) (4), Laws of 1936—Third Extraordinary Session, ch. 2, amended by Laws 1937, ch. 260 (1935 Colorado Statutes Annotated, Vol. IV, ch. 167A, sec. 19 (f) (4)); Connecticut, sec. 804d, Public Acts 1936—Special Session, ch. 2; amended by Public Acts 1939, ch. 310 (the provision does not appear until the 1939 ch. 310 amendment); Delaware, sec. 2 (h) (4), Laws of Delaware—Ch. 258, amended by Laws 1939, ch. 196 (sec. 2 (h) is affected, but subsec. (4) remains the same); Florida, sec. 3 G IV, Acts of 1937—Ch. 18402 (Compiled General Laws of Florida, Permanent Supplement, Title XI, ch. CVII, sec. 4151 (490) G IV); Hawaii, sec. 2 (j) (4), Laws of Hawaii 1937—Act 243—(sec. 2 (j) (4) appears in Laws of 1939, Act 219, for first time); Illinois, sec. 2 (e) (5), Laws of 1937—S. B. 436, p. 571, amended by Laws 1939, S. B. 458, p. 571, in which sec. 2 (e) (5) was amended (originally was sec. 2 (e) (4)) (Smith-Hurd Illinois Annotated Statutes, ch. 48, sec. 218 (e) (5)); Iowa, sec. 19 (f) (4), Laws of 1936—Ch. 4, Extra Session, Laws of 1937, ch. 102; re-enacted the law, amended by Laws of 1939, ch. 68 (Code of Iowa 1939), ch. 77.2, sec. 1551, 25 F (4)); Louisiana, sec. 18 (f) (4), Laws of 1936, Act 97—Sec. 18 re-enacted by Laws 1938, Act 164, and Laws 1940, Act No. 16 (E. S.) (General Statutes 1939, sec. 4434.18 (f) (4)); Maine, sec. 19 (f) (4), Public Laws of 1935—First Special Session 1936, amended by P. L. 1937, ch. 228; Maryland, sec. 19 (f) (4), Laws of 1936—Extraordinary Session, ch. 1, amended by Laws 1937 (Special Session), ch. 2; Laws 1939, ch. 278, re-enacted sec. 19 (Annotated Code of Maryland, article 95 A, sec. 19 (f) (4); Michigan, sec. 41 (3), Public Acts of 1936—Extra Session, Act No. 1, amended by Public Acts 1937, Act No. 347; (Michigan Statutes Annotated, ch. 154b, sec. 17.543 (3)); Minnesota, sec. 2 (f) (4), Laws of Minnesota 1936—Extra Session, ch. 2; amended by Laws 1937, ch. 43, ch. 306; Laws of 1939, ch. 443 (Masons' Minnesota Statute, 1940 Supp., ch. 23 AA, sec. 4337-22 F (4)); Mississippi, sec. 19 (h) (4), Laws of Mississippi, 1936—ch. 176, amended by Laws 1938, ch. 147, amended by Laws 1940, ch. 295 (Mississippi Code—1938 Supplement, Sec. 2830.19 (h) (4); Missouri, sec. 3 (h) (4); Laws of Missouri, 1937, p. 574, amended by Laws 1939, p. 887 (Missouri Statutes Annotated, Vol. 7, Sec. 13194—3 (h) (4); Nebraska, sec. 2 (g) (4), Laws of Nebraska 1937, ch. 108, p. 370, amended by Laws 1939, ch. 56, p. 228 (Compiled Statutes of Nebraska 1939 Cumulative Supplement, Ch. 48-702 (g) (4); New Hampshire, sec. 1 (H) (5), Laws of New Hampshire, 1935, ch. 99, amended by Laws 1935, ch. 142; Laws 1937, ch. 178 re-enacts sec. 1 (sec. 1 (H) (5) appears for the first time); New Jersey, sec. 43:21-19 (h) (4), Acts of 1936, Special Session, ch. 270, amended by Laws 1938, ch. 312,

All of these states have deemed the common control provision in question to be essential to the fair and effective administration of their law. Yet if the decision of the Supreme Court of Indiana as to the meaning of the equal protection clause of the Federal Constitution is allowed to stand together with the decision of the Supreme Court of Georgia, the validity of the provision in the laws of the other states and the successful administration of the unemployment compensation programs of such states will be seriously endangered. Furthermore, the importance of

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amended by Laws 1939, ch. 94 (Revised Statutes—Cumulative Supplement 1939, ch. 21, sec. 43:21-19 (h) (4)); New Mexico, sec. 19 (f) (4), Laws of New Mexico, 1936—Special Session, ch. 1, amended by Laws 1937, ch. 129, Laws of 1939, ch. 175 (1938 Supplement to New Mexico Statutes Annotated, sec. 156-319 (f) (4)); North Carolina, sec. 19 (f) (4), Public Laws of North Carolina, 1936—Extra Session, ch. 1 (North Carolina Code of 1939 Annotated, sec. 8052 (19) (f) (4)); North Dakota, sec. 2 (f) (4), Laws of North Dakota, 1937, ch. 232; amended by Laws 1939, ch. 215; Oklahoma, sec. 19 (f) (4), Session Laws of Oklahoma, 1936, Extra Session, ch. 1 (appears as ch. 52 in Session Laws 1936-37), amended by Laws 1939, ch. 52, p. 335 (Oklahoma Statutes Annotated, Title 40, sec. 229 (f) (4)); Rhode Island, sec. 3 (5) (a) (4), Public Laws of Rhode Island, 1936, ch. 2333 (sec. 3 (5) (a) (4) does not appear until 1937 amendment), amended by Laws 1937, ch. 2556, amended by Laws 1939, ch. 670 (General Laws of Rhode Island, 1938, ch. 284 (does not contain 1937 revision)); South Carolina, sec. 19 (f) (4), Acts of South Carolina, 1936—Act No. 946, amended by Laws 1939, Act No. 316, p. 487; South Dakota, sec. 19 (f) (4), Laws of 1936, Special Session, ch. 3 (South Dakota Code 1939, sec. 17.0802 (6) (d); Tennessee, sec. 19 (f) (4), Acts of Tennessee, 1936—Extra Session, ch. 1; amended by Laws 1937, ch. 128, secs. 87, 88 (Williams Tennessee Code Annotated, sec. 6901.19 (f) (4)); Texas, sec. 19 (f) (4), Acts of 1936—Third Called Session, ch. 482, amended by Acts 1937, ch. 67, amended by Acts 1939, p. 436 (Vernon's Revised Civil Statutes Annotated, Art. 5221b—17 (f) (4); Utah, sec. 19 (i) (4), Laws of Utah, 1936—Special Session, ch. 1, amended by Laws of 1937, ch. 43, amended by Laws of 1939, ch. 52, Utah Revised Statute Supplement 1939, sec. 42-2B-19 (i) (4); Virginia, sec. 2 (i) (4), Acts of 1936—Extra Session, ch. 1, amended by Laws of 1938, p. 1004, ch. 446, amended by Laws of 1940, p. 538, ch. 333 (1940 Cumulative Supplement to the Virginia Code of 1936 Annotated, sec. 1887 (94) (i) (4); Washington, sec. 19 (f) (4), Laws of Washington, 1937, ch. 162 (Remington's Revised Statutes of Washington, sec. 9998-119 (f) (4)).

the question suggested that it should be authoritatively resolved by this court.

The scheme of the Indiana unemployment compensation law and of most of the state unemployment compensation laws having this provision is as follows: In general the statute will be limited to employers of eight or more. However, the exemption of employers of seven or less is limited and not absolute. One of the limitations is that where two or more employing units under common ownership or control would, if grouped together, employ more than eight for the required period, they will be deemed to be covered.

The inclusion of the provision affecting this limitation results from a recognition that laws applicable to employers of eight or more can very easily be evaded by the simple procedure of splitting establishments or entities. In certain types of business, particularly those where labor costs represent a large part of the total expenses of operation, and where efficiency would not be materially impaired by the division into separate units, an employer might find it profitable to split his establishments into several smaller units, each employing less than eight employees.

A law having the broad social implications of unemployment compensation, cannot be administered successfully under circumstances permitting obvious evasion.

The decision of the Supreme Court of Indiana necessarily adjudicates that many workers who the legislature intended should be protected from the risks and hazards of unemployment are to be denied that protection. We cannot, of course, foretell with precision what the effect of this new decision will be. There are thousands of others employed by larger establishments which may well be split up in order to achieve the exemption which this decision affords. These employees have heretofore felt secure in the belief that when unemployed they will be entitled to

the benefits of the unemployment compensation law. The decision of the Indiana Supreme Court, unless reversed by this court, foretells a severe shock to them and a serious impairment of the efficacy of the nation-wide system of unemployment compensation.

The decision of the Supreme Court of Indiana will be harmful to employers as well as to employees. The major reason impelling the legislature to exclude small employers was the administrative inconvenience in collecting taxes from them and the burden of these taxes upon a small employer who did not share the economic advantages of large scale organization. *Carmichael v. Southern Coal & Coke Co.*, (1937) 301 U. S. 495, 511. Through section 2 (g) (4) the Indiana legislature has determined that in dealing with establishments which are owned or controlled by the same interests and which together employ more than eight employees, there are not the problems, difficulties and inconveniences which justify the exclusion of employers of less than eight. They might well and reasonably did believe that such establishments keep wage records, utilize bookkeeping and accounting services in common, and avail themselves of the increased profits which flow from large scale organization. In short, the reasons which justify the general exemption of employers of less than eight, are not, in fact, applicable to employers of less than eight whose establishments are owned or controlled by the same interests. Indeed, if the common ownership or control provision is stricken from the law, an employer of eight or more individuals will be the object of severe economic discrimination since competitors enjoying the same advantages of size of organization that he does, would be exempted by the fortuitous circumstances that they had divided their establishments.

3. The decision of the Supreme Court of Indiana is in conflict with numerous decisions of this court

and denies to the state legislature the power to classify the subject of taxation in accordance with the needs of the legislation at issue.

To assure uniform treatment of all employers and employees, similarly situated, the General Assembly saw fit to include not only individual employers of eight or more employees but also any group of small employing units which are owned or controlled by the same interests and which collectively employ eight or more workers. This is on the theory that it is the person or entity who or which controls the employment of eight or more employees that is to be reached and it is immaterial whether such control is exercised through majority stock ownership of corporations, as here, or otherwise. Employment of eight or more persons should be recognized even though the person exercising control of such employment masks behind two corporations. Equal protection is guaranteed to all persons subject to state legislation, who are similarly situated. It guarantees, however, only the protection enjoyed by other persons or classes in the same situation or under like circumstances. We do not believe that the statutory provision in question denies equal protection of the law. The state legislature is not prohibited by the constitution from discriminating among members of the same class provided the discrimination is not arbitrary, or oppressive, but has a definite public purpose. The class to which this provision applies consists of those who in any way control the employment of eight or more persons. Its purpose was to extend the coverage of unemployment compensation to all employees of large employer interests without regard to technicalities.

The act does classify persons who control the employment and unemployment of eight or more persons; and its application is uniform whether such control of the employ-

ment of eight or more is accomplished individually, through partnership agreements, through trusts, or, as in this appeal through corporations.

In the case of *Barrett v. Indiana,* (1913) 229 U. S. 26, 29, in discussing the reasonableness of a classification, the court said:

> "The legislature is permitted to make a reasonable classification, and before a court can interfere with the exercise of its judgment, it must be able to say 'that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.' "

Section 2 (g) (4) applies to all within the class with equal force. All employing units are within the purview of the section and the legislature has not singled out corporations or any other particular class of employing units.

This court in upholding the constitutionality of the Alabama unemployment compensation law, *Carmichael v. Southern Coal & Coke Co.,* (1937) 301 U. S. 495, did not, in specific terms, treat with the provision of the Alabama law which was very similar to the provision of the Indiana unemployment compensation law.[1] The court did, however, treat with the basic classification of employers of eight or more and of other inclusions and exclusions of the law and confirmed the broad powers of the legislature to classify

[1] The provision of the Alabama law was as follows: "Where any person . . . either directly or through a holding company or otherwise has a majority control or ownership of otherwise separate business enterprises employing persons in the State, all such enterprises shall be treated as a single 'employer' for the purposes of this Act." (Sec. 2 (f), Alabama unemployment compensation law, Chapter 447, Laws of 1935 as amended. By amendments in 1939, however, following the decision in the *Carmichael* case, the Alabama unemployment law was changed so that it now no longer contains any provision comparable to that here at issue. Act No. 497, Laws of 1939, effective September 21, 1939.

employers in the interest of sound administrative practice. This court said:

> "* * * It is argued here, and it was ruled by the court below, that there can be no reason for a distinction, for purposes of taxation, between those who have only seven employees and those who have eight. Yet, this is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competence is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not.
>
> "Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others. *Citizens Telephone Co. v. Fuller,* 229 U. S. 322, 332; *Hatch v. Reardon,* 204 U. S. 152, 159; *New York v. Latrobe,* 279 U. S. 421, 428; *Aero Transit Co. v. Georgia Public Service Commission,* 295 U. S. 285, 289. Cf. *Florida Central & Peninsular R. Co. v. Reynolds,* 183 U. S. 471, 480; *Packer Corp. v. Utah,* 285 U. S. 105, 110, footnote 6. We cannot say that the expense and inconvenience of collecting the tax from small employers would not be disproportionate to the revenue obtained. For it cannot be assumed that the legislature could not rightly have concluded that generally the number of employees bears a relationship to the size of the payroll and therefore to the amount of the tax, and that the large number of small employers and the paucity of their records of employment would entail greater inconvenience in the collection and verification of the tax than in the case of larger employers." (301 U. S. 495, 510, 511).

As indicated above, the common control provision is part and parcel of the basic classification in cases of employers of eight or more.

(a) The common control provision is essential to prevent avoidance or evasion of the Unemployment Compensation Law.

The manner in which the unemployment compensation law could be avoided or evaded if this provision is stricken has been described above. Assuming the statute as a whole is valid, any provision reasonably designed to avoid possible evasion is justified. The avoidance of evasion has frequently been upheld as a basis for classification. See *Tyler v. United States,* (1930) 281 U. S. 497, 505; *Helvering v. Bullard,* (1938) 303 U. S. 297, 302; *Helvering v. City Bank Farmers Trust Co.,* (1935), 296 U. S. 85, 92; *Ruppert v. Caffey,* (1920), 251 U. S. 264, 282.

In the recent case of *Natural Gas Pipe Line Company v. Slattery,* (1937) 302 U. S. 300, 308, this court upholding as reasonable a statute which gave to the Illinois Commerce Commission jurisdiction over "affiliated interests" of a corporation, said:

> "Common management of corporations through officers or directors, or common ownership of a substantial amount, though less than a majority of their stock, gives such indication of unified control as to call for close scrutiny of a contract between them whenever the reasonableness of its terms is the subject of inquiry."

See also *Rochester Tel. Corp. v. United States,* (1939) 307 U. S. 125, 145.

The Federal Income Tax Laws have for a long time had a provision which requires related corporations to submit consolidated returns. In *United States v. Whyel,* 19 F. (2d) 260, 262, (1927), the court specifically upheld this provision. In that case the *Whyel Coal Company* and the *Why-*

el Coke Company were separate corporations. Two brothers owned 94 per cent of the coal company stock and 99 per cent of the coke company stock. The United States Government required consolidated income tax returns to be filed on the theory that the corporations were affiliated within the meaning of the federal statute which provides as follows:

> "For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."
>
> Section 240 (b) of the Revenue Act of 1918.

Note that the Congress used the same device in this statute to prevent evasion as that used by the General Assembly of Indiana in the provision in question. The distinction between the federal statute, which confines the application to corporations in which substantially all the stock is owned or controlled by the same interests, and the Indiana statute is merely one of degree. Attention is also called to the fact that the language, "owned or controlled by the same interests," is identical with that of the Indiana statute. It is also to be noted that even under the federal provision there must be a minority bloc of stockholders to be considered. In this case the court said:

> "* * * The clear purpose of the act as to affiliation was to safeguard the interests of the government against the possible loss of revenue which would result from the evasion of the excess profits tax, through manipulation and shifting of profits, as between two or more closely associated corporations, where there was actual or potential unity of control of corporate affairs * * *"

> "* * * It is claimed that it is not within the power of Congress to impose a tax on one tax payer computed upon another tax payer's income. It will be observed that in this suit the total tax is computed as a unit, based upon the total net income of the affiliated corporations; then the assessments are made against the respective corporations in such proportions as they may agree upon, or, in the absence of such agreement, on the basis of the net income properly assigned to each, where unity of control exists. Congress certainly has power to enact legislation so as to prevent manipulating or shifting profits in order to avoid taxation."

A holding that the legislature may not consider the common control of employers for the purpose of determining coverage under the unemployment compensation law in effect constitutes an encouragement to employers to split their establishments, wherever possible into groups employing seven or less.

The fact that some innocent parties come within the purview of such provision is not material if the classification is otherwise reasonable. The provision injects no element of fraud or good faith into the picture. That such classification will in some instances make innocent employers liable may well be foreseen. Presumably, where the separate establishments are engaged in different types of business it may well be urged that no reason to evade could be reasonably found. This however, would not affect the validity of the provision in question. *Euclid v. Ambler Co.*, (1926) 272 U. S. 365.

(b) The common control provision represents an effort on the part of the legislature to remove discrimination which otherwise would exist.

It has been pointed out above that the common control provision in question is essential if economic discrimination among different employers is to be avoided. In imposing a tax liability based upon pay rolls, the legislature

should avoid giving one business establishment a competitive advantage over another. In drawing a distinction between large and small employers, it was recognized as signicant that the larger employer enjoys certain advantages of large scale organization which are not available to the small employer. But when a large employer splits his establishment into several smaller units, he does not lose these advantages; he continues to compete with the employer who has not split his functions. The legislature in its desire to avoid any discrimination of this type qualified the exemption of the small employers so as to equalize the burden of taxation on all employers similarly situated.

The basic test of the constitutionality of any legislative classification is its reasonableness in the light of the purposes of the law. One of the objectives of the common control provision is to remove whatever discriminatory consequences might have ensued from an unqualified exclusion of employers of seven or less. This alone should justify the legislative effort to avoid unjustified discrimination.

It should be noted that provisions almost identical to the one here in question have been given judicial recognition in other states by the highest courts of such states. *Unemployment Compensation Commission v. City Ice & Coal Co.* (1939), 216 N. C. 6, 3 S. E. (2d) 290; *Gibson Products Co. v. Murphy* (1940), 186 Okla. 714, 100 P. (2d) 453; *Florida Industrial Commission v. Gary-Lockhart Drug Co.* (1940), — Fla. —, 196 So. 845; *Maine Unemployment Compensation Commission v. Androsocoggin, Jr., Inc.*, et al. (1940), — Me. —, 16 Atl. (2d) 252.

CONCLUSION

The decision of the Indiana court in the instant case, particularly in view of its relationship to the decision of the Georgia Supreme Court in the *Independent Gasoline*

case threatens to remove an invaluable prop to the administration of the national system of unemployment insurance. It is essential that this court give guidance to state courts, and correct the erroneous belief that the provision here at issue is unconstitutional under the provisions of the Federal Constitution.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued as of and under the seal of this Honorable Court, directed to the Supreme Court of Indiana, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 27429, Benner-Coryell Lumber, Company, Inc., Appellant, v. Indiana Unemployment Compensation Board, Appellee," and that said judgment of the Supreme Court of Indiana may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet ~~and~~ and just; and your petitioner will ever pray.

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